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No. 82-478

In the
Supreme Court of the United States

RECORA CO., INC.,
Defendant and Counter-Plaintiff, Petitioner,

vs.

TAPESWITCH CORPORATION OF AMERICA,
Plaintiff and Counter-Defendant, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX AR1

IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-478

RECORA CO., INC.,
Defendant and Counter-Plaintiff, Petitioner,

vs.

TAPESWITCH CORPORATION OF AMERICA,
Plaintiff and Counter-Defendant, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner is simply a disgruntled party seeking no more than a review by this Court of the consistent findings of fact of the two courts below. There are no special and important reasons for granting the writ and in fact the issues presented by the Petitioner have been reviewed *four times* by the courts below, the result of each of these reviews being consistently adverse to the Petitioner. Petitioner does no more than to rehash again its contrary interpretation of the evidence, an interpretation which the trial court characterized as "bluntly, falsehood."

STATEMENT OF THE CASE

Petitioner's Statement of the Case appearing on pages 10-19 of its Petition is highly argumentative and relies heavily upon statements of record made by one of the attorneys for the Petitioner, which statements were characterized as a falsehood by the trial court. Respondent accordingly submits the following counterstatement of the case.

This lawsuit was originally instituted by Respondent alleging infringement by the Petitioner of a patent owned by the Respondent. Petitioner filed an antitrust counterclaim. The trial was bifurcated with the issues relating to patent infringement being determined adverse to the Respondent. The remaining antitrust counterclaim was initially dismissed by the trial court, the dismissal being reversed by the Seventh Circuit and this antitrust counterclaim formed the *sole* basis for the continuing proceedings which were ultimately dismissed by the trial judge, Judge Moran. The reason for dismissal had nothing whatsoever to do with the merits of Respondent's original patent infringement claim or with the merits of the counterclaim, but was based solely on the unexcused failure of counsel for Petitioner to comply with a court order dated March 25, 1981 directing Petitioner to serve a draft of a final pretrial order upon Respondent on or before April 20, 1981. Thus the lengthy discussion of Petitioner regarding the merits of the patent and antitrust issues is completely extraneous, irrelevant and immaterial to the issue which was reviewed by the Seventh Circuit and of which (when properly cast) review is sought by this Court, namely whether the District Court abused its discretion in dismissing Petitioner's counterclaim as a result of

Petitioner's continued failure to respect and follow the orders of the District Court.

The noncompliance of Petitioner with the order of the District Court occurred after a pretrial conference at which Petitioner's counsel Mr. Ambrose was present as was counsel for Respondent. In Petitioner's Statement of the Case, Petitioner takes issue as to what Mr. Ambrose was ordered to do at the conference; however, it was clear to counsel for Respondent, and more importantly it was clear to the trial judge, that Mr. Ambrose was explicitly told that failure of Recora to file the pretrial order by the specified date would result in dismissal of the action. The independent recollections of the trial judge as to exactly what Mr. Ambrose was ordered to do are set forth in the Memorandum and Order dated June 9, 1981 (set forth on pages A-38 through A-41 in the Appendix to the Petition) denying Petitioner's Motion to Vacate the Dismissal as follows:

> "Recora's counsel was expressly and explicitly advised that there would be no further extensions and that failure to comply would result in dismissal. The representation of Recora's counsel that he was unaware that he was required to tender a draft pretrial order by April 20 on pain of dismissal is, bluntly, a falsehood."

The Motion to Dismiss of the Respondent which was granted by the trial judge was, moreover, the *fourth* such motion to be filed by the Respondent. Respondent filed its first Motion to Dismiss in September, 1980 after Petitioner had refused to make its President available for a deposition. Although this person had been previously deposed, the trial judge determined that Respondent was entitled to further depose him and ordered

that he be made available and accordingly denied Respondent's Motion. The parties were also ordered to file a pretrial order by February 26, 1981.

In spite of the court's order, Petitioner did not make its President available for deposition and did not file a pretrial order by February 26, 1981, and Respondent accordingly filed its second Motion to Dismiss, the failure of Petitioner to make its President available preventing Respondent from preparing a meaningful pretrial order of its own or agreeing to a joint pretrial order. Respondent's second Motion to Dismiss was denied and the trial judge ordered that a pretrial order be submitted to Respondent by Petitioner no later than March 13, 1981 and that a final pretrial order be filed by March 25, 1981. Even at this early date, the trial judge informed counsel for Petitioner that sanctions would be imposed if the Court's Order was not followed.

With no pretrial order being received by Respondent, and none having been filed with the court by Petitioner as of March 25, 1981, Respondent brought its third Motion to Strike the Counterclaim and Dismiss the Action, which the Court took under advisement and the above-discussed Order dated March 25, 1981 was entered after counsel for Petitioner was *again* explicitly told that the counterclaim *would* be dismissed if Petitioner again failed to comply.

Finally, this matter was dismissed by the trial judge who granted Respondent's fourth Motion to Dismiss after Petitioner again failed to comply with the Court's Order. Petitioner filed a Motion to Vacate the dismissal which was denied by the trial court after again giving a full and careful review to the above history of the lawsuit.

Recora then appealed to the Seventh Circuit, a unanimous panel upholding the actions in the court below in all respects. Petitioner then filed a Petition for Rehearing en banc, which was denied.

THE QUESTION PRESENTED FOR REVIEW

The question presented for review by Petitioner set forth on page 2 of the Petition is so replete with Petitioner's evidenciary interpretations, which are contrary to the findings of the District Court and the Seventh Circuit, as to be almost unrecognizable as a statement of the issue which was reviewed by the Seventh Circuit. As more fully discussed below, the suit was *not* dismissed for "alleged or late compliance" as asserted by Petitioner, but was dismissed for *noncompliance* with orders of the District Court. Contrary to Petitioner's contention that "no admonition" was made by the trial court before dismissal, Petitioner's counsel was informed on several occasions that Petitioner's counterclaim was perilously close to being dismissed. Whether or not the conduct of Petitioner's counsel is "excuseable" is irrelevant to the matter on appeal inasmuch as all of the Petitioner's purported "excuses" were presented to the trial court only *after* dismissal occurred, and no attempt whatsoever was made by counsel for Petitioner to seek a continuance or inform the trial court of Petitioner's inability to comply with the Court's order *before* the date set by the trial court. Finally, Petitioner makes the remarkable assertion that its actions in the courts below were not prejudicial to Respondent.

As a review of the record in the Seventh Circuit indicates, the *sole* question reviewed by the Seventh Circuit was whether the dismissal of the counterclaim of Petitioner by the District Court was an abuse of discretion.

REASONS FOR DENYING THE WRIT

Respondent will below respond to each of the arguments set forth by the Petitioner in Section IX of its Petition (set forth on pages 20-34 of the Petition) in the order treated by the Petitioner. There are no "special and important reasons" for granting the writ as required by Supreme Court Rule 17, in particular none of the three exemplary reasons set forth in sections (a) through (c) of Rule 17 are present.

Petitioner Cannot Now Seek Review of the Timeliness of Respondent's Motion to Dismiss Because Petitioner Did Not Raise That Issue in the District Court.

Petitioner contends that Respondent's fourth Motion to Dismiss was not served in a timely manner in the District Court. This issue was not raised by Petitioner in the trial court, and in fact counsel for Petitioner appeared at the noticed hearing and thus had ample opportunity to contest the timeliness of Respondent's Motion. Petitioner did not do so, and is therefore precluded from now arguing this issue on appeal as noted by the Seventh Circuit (Petitioner's Appendix, A-49).

Petitioner's After the Fact Excuses are Immaterial to Determining Whether the Trial Court Abused Its Discretion in Dismissing the Action.

The law is well-settled that dismissal of an action for repeated failure of the party bringing the action to comply with the rules of discovery under the provisions of Rule 37 (b) (2) (C), F.R.C.P. (set forth on page A-55 of Petitioner's Appendix) must be reviewed on appeal

by determining whether the dismissal by the court below was an abuse of discretion. As stated in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), rehearing denied 429 U.S. 874 (1976):

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. E.g., C. Wright & A. Miller, Federal Practice and Procedure: Civil §2284, page 765 (1970); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1211 (CA8 1973); *Baker* v. *F. & F. Investment*, 470 F.2d 778, 781 (CA2 1972)."

The same standard is applied for dismissal of an action for failure to comply with an order of the Court under Rule 41(b), F.R.C.P. as held in *Asociacion de Empleados, etc.* v. *Morales*, 538 F.2d 915, 916 (1st Cir. 1976).

Petitioner cites a number of cases to the effect that dismissal of an action is a harsh remedy which should not be utilized as a means of first resort in order to rebuke a dilatory or uncooperative party. If the present situation is not one justifying dismissal, it is difficult to envision a set of circumstances for which dismissal would be proper. Petitioner continues to assert its contrary and unsupported version of what its counsel were ordered to do by the District Court, in the face of *four* reviews of the matter by the District Court and the Seventh Circuit, all of which consistently rejected Petitioner's contentions. Both the District Court judge and counsel for Respondent independently recalled that counsel for Petitioner was explicitly told at the conference held in chambers on March 25, 1981 that Petitioner was ordered to submit a pretrial order no later than April 20, 1981

upon pain of dismissal. This Order is clearly set forth in the Minute Order of the District Court dated March 25, 1981, which Petitioner conveniently omits from its Appendix and which is set forth in Respondent's Appendix at AR-1. Respondent's Fourth Motion to Dismiss is found at AR-2 et seq.

Despite the fact that counsel for Petitioner, Mr. Ambrose, was present at the conference, Mr. Ambrose apparently did not receive a copy of the Minute Order because his name was not listed on the front of the District Court docket sheet, even though he had entered an appearance on behalf of Petitioner. Petitioner's other counsel, Mr. Faier, was out of town during the weeks preceding the date on which Petitioner was ordered to submit its pretrial order, and even though the Minute Order dated March 25, 1981 was delivered to Mr. Faier's office, the order lay unopened in his office until after the crucial date passed. Petitioner seeks to excuse its noncompliance by the technicality of Mr. Ambrose not receiving a copy of the order memorializing a pretrial conference *at which he was present.* Moreover, *three pages* of entries exist in the District Court docket for the period between the time Mr. Ambrose filed his appearance and the time the counterclaim was dismissed, however, Mr. Ambrose never earlier took steps to remedy the fact that he was presumably not receiving documents from the court during this period of *seven months* preceding dismissal. Apparently, counsel for Petitioner did not care whether or not he received documents from the court until after dismissal, at which time such receipt suddenly became "important."

As stated by the Seventh Circuit in *Loctite Corp.* v. *Fel-Pro, Inc.*, 667 F.2d 577, 581 (7th Cir. 1981), an at-

torney's duty is not discharged solely by technical compliance with a court order, and it follows that noncompliance cannot be excused by citing immaterial technicalities such as the failure of the District Court Clerk to transmit a minute order to an attorney relating to a conference at which that attorney was present:

> "Loctite's arguments stress literal compliance, but nowhere appear to recognize that it had a duty not only to comply minimally with what was ordered, but to assist in the resolution of the suit. Instead, Loctite balked at every attempt to clarify the issues; it now profers technical arguments to induce this court to believe its conduct was acceptable."

Moreover, as the Seventh Circuit recognized, the findings of the trial judge must be given considerable weight and are binding on the court unless clearly erroneous as stated in the *Loctite* case at page 582:

> "The trial judge, having dealt with the parties and issues in this suit for almost three years, has had the best opportunity to assess the need for the desired discovery and the degree of compliance. His findings are binding on us unless clearly erroneous. *Reese* v. *Elkhart Welding & Boiler Works, Inc.*, 447 F.2d 517, 520-21 (7th Cir. 1971); *American Chemical Paint Co.* v. *Firestone Steel Products Co.*, [117 F.2d 927, 929 (6th Cir. 1941)]"

Similarly, as stated in *Van Bronkhorst* v. *Safeco Corp.*, 529 F.2d 943, 947 (9th Cir. 1976):

> "It is equally clear that the District Judge's determination that his order was not complied with is entitled to considerable weight on appeal since he is in the best position to assess the circumstances."

Petitioner has failed to demonstrate that the findings of the trial judge were clearly erroneous and the statements

of the trial judge in his order denying Petitioner's Motion to Vacate the dismissal must be afforded persuasive weight in reviewing the dismissal of Petitioner's counterclaim.

The District Court Did Not Abuse Its Discretion in Dismissing the Counterclaim.

At the outset, Petitioner submits that even if the actions of the attorneys for the Petitioner were inexcusable, the client should not be penalized for the actions of its counsel. This is in direct contradiction to the explicit ruling of this Court in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1961) wherein the dismissal of an action was upheld as not being an abuse of discretion, and wherein this Court stated:

> "There is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts' notice of which can be charged upon the attorney. *Smith* v. *Ayer*, 101 U.S. 320, 326."

Petitioner's penetrating response to this squarely dispositive statement is that the dissent should be followed.

Petitioner's counsel controlled their own destiny and, if they were unable to comply with the order of the District Court to submit the pretrial order by the specified date, it was encumbent upon them to notify the District

Court in advance, rather than simply letting the date pass with no motion presented to the Court or notification to the Clerk of Court. In view of the several motions to dismiss which had been previously brought by Respondent and the District Court's increasingly strong warnings to Petitioner, it is embarassing that Petitioner still asserts that the dismissal by the District Court was unexpected and that Petitioner had no inkling of the perilous ground upon which it was treading. Petitioner complains that the District Court did not "accommodate" Petitioner in view of the purported "excuses" raised by the Petitioner at the time of dismissal; however, this position ignores the tremendous patience which the District Court exercised with regard to the Petitioner in the several months preceding the dismissal (See Respondent's Memorandum in Support of its Fourth Motion to Dismiss, AR-4 et seq.). The District Court finally determined that dismissal was the only sanction which Petitioner would understand. The Federal Courts simply cannot permit continued violation of their respective orders, as in the present case, and maintain the respect and integrity to which they are entitled. This policy consideration is admirably set forth in the *National Hockey League Case, supra* at pages 642-643 as follows:

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with the future discovery orders of the District Court.

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts. Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondent's 'flagrant bad faith' and their counsel's callous disregard' of their responsibilities." (Emphasis in original).

The *National Hockey League* case stands for the further proposition that in reviewing the propriety of a dismissal, the question is not whether this Court would have chosen to dismiss the lawsuit, but whether the District Court abused its discretion in so doing. *National Hockey League, supra* at 642.

Petitioner Was Provided Ample Opportunity to Present Its Position in the District Court.

Finally, Petitioner argues that the actions of the District Court were "summary" and did not afford Petitioner adequate opportunity to respond to Respondent's Motion to Dismiss. This completely ignores the fact that this was the *fourth* such motion and further ignores the

explicit admonition given by the District Court to counsel for Petitioner at the hearing on March 25, 1981. This argument of Petitioner is an attempt to obscure the fact that even if the actions of Petitioner's counsel were excusable, no indication whatsoever was given to the District Court *before* dismissal, thus continuing in Petitioner's disregard for the Court's authority.

Petitioner would have this Court believe that Petitioner's noncompliance was an isolated incident comparable to those discussed in the authorities cited on pages 23-32 of its Petition. Petitioner's final delay was, however, the culmination of a course of conduct exhibited by Petitioner throughout the District Court proceedings (as set forth in Respondent's Memorandum in support of Fourth Motion to Strike Counterclaim and Dismiss the Action, AR-4 et seq.) and the trial judge was justified in his conclusion that no sanction short of dismissal would be meaningful to Petitioner, as he had warned Petitioner prior to the actual dismissal of the counterclaim.

In contesting the trial judge's recollection of what Petitioner was ordered to do at the March 25, 1981 conference, Petitioner complains that no transcript was made of this conference. As the Seventh Circuit stated, however, the absence of a transcript does not require the presumption that the trial judge's memory is in error (particularly in view of a consistent independent recollection of the trial judge's admonition to Petitioner as set forth in Respondent's Motion to Dismiss, AR-2 et seq.)

Petitioner further complains of being denied an evidentiary hearing on the issue of what was said at the March 25 conference; however, as held by the Seventh

Circuit in *Loctite*, supra, at p. 583, n. 6, an evidentiary hearing is not required prior to a Rule 37 dismissal when there has been an adequate briefing on the circumstances surrounding non-compliance. The trial judge, having been in attendance at the March 25 hearing, did not need to be told by Petitioner what he said at the hearing. Moreover, Petitioner presented two affidavits attached to its Motion to Vacate the Dismissal, which were fully reviewed by the trial judge and which did not cause him to reject his own recollection of the conference. In fact, as discussed earlier, the judge rejected the contentions in the affidavits that Petitioner's counsel was not told dismissal was a real possibility as a "falsehood." Petitioner has now been heard *four times* on this issue with consistent rulings in favor of Respondent. A fifth review is unnecessary and unwarranted and would be a waste of this Court's valuable time.

Respondent Has Been Prejudiced by the Actions of Petitioner Which Support Dismissal.

Petitioner submits that Respondent has not been prejudiced by Petitioner's delaying tactics in the District Court. The fact is that the delay which finally caused the trial judge to dismiss Petitioner's counterclaim was the last delay in a series of delays and there is no assurance whatsoever that if Petitioner is given a "reprieve" by reversal of dismissal that Petitioner and other similarly-situated litigants will not revert to the same attitude and practice adopted over the course of this litigation to the further prejudice of Respondent and the integrity of the Federal Courts. Petitioner seemingly asserts that its failure to file a pretrial order as ordered by the District Court is *de minimus* in view of the fact

that this lawsuit has been pending since 1973. As stated by the Seventh Circuit in affirming dismissal, however, the fact that the lawsuit had been pending for some time should have made Petitioner more sensitive to delay (Petitioner's Appendix, pages A-49-50).

CONCLUSION

For the reasons set forth above, Respondent Tapeswitch respectfully submits that there are no special and important reasons for granting review of this matter on writ of certiorari and that the dismissal of Petitioner's counterclaim by the District Court was not an abuse of discretion and was fully supported and justified by the continued failure of Petitioner to afford the authority of the District Court the respect and obedience which that authority demands from the public as well as from the attorneys who are its officers. The affirmance of the dismissal by the Seventh Circuit was proper in all respects and the writ should be denied.

Respectfully submitted,

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2567

TAPESWITCH CORPORATION OF AMERICA

v.

RECORA CO.

MINUTE ORDER
date: March 25, 1981

Pretrial conference held. Counter-Plaintiff is directed to serve draft of final pretrial order upon Counter-Defendant on or before April 20, 1981 and to comply without standing discovery prior to that date. Pretrial conference continued to April 29, 1981 at 9:45 a.m. Trial set for April 6, 1981 at 10:00 a.m. is stricken.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 73 C 2567

TAPESWITCH CORPORATION,

Counter-Defendant,

v.

RECORA CO.,

Counter-Plaintiff.

FOURTH MOTION TO STRIKE THE COUNTERCLAIM AND DISMISS THE ACTION FOR FAILURE TO COMPLY WITH DISCOVERY AND THIS COURT'S ORDER

Tapeswitch Corporation, Counter-Defendant in this action, moves the Court for the fourth time for an order striking the counterclaim and dismissing this action with prejudice and cost. This Court has been lenient with Counter-Plaintiff on three prior occasions, always continuing Counter-Defendant's motion to strike even though the Court has said it considers it to be reasonable. At the last hearing on this matter, the Court finally told Counter-Plaintiff that if it did not comply with its orders by hand-delivering the required documents to the Counter-Defendant by April 20, 1981 that it *would* dismiss this action. Counter-Plaintiff is obviously totally indifferent to this Court's warning and has not so much

as even telephoned Counter-Defendant to excuse its failure for the fourth time. Enough is enough. The time is now to dismiss this case. The Counter-Defendant is entitled to have this action dismissed. The Court has ample justification for doing it; justice requires it. Most importantly, the Counter-Defendant could really care less.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 73 C 2567

TAPESWITCH CORPORATION,

Counter-Defendant,

v.

RECORA CO.,

Counter-Plaintiff.

MEMORANDUM IN SUPPORT OF FOURTH MOTION TO STRIKE COUNTERCLAIM AND DISMISS THE ACTION FOR FAILURE TO COMPLY WITH DISCOVERY AND THIS COURT'S ORDER

The following chart of the history of events is the basis in support of this Fourth Motion to Strike and Dismiss together with the supporting documents which are the Exhibits attached hereto.

1. 3/28/80 Counter-Defendant serves Interrogatories on Counter-Plaintiff.
2. 3/28/80 Counter-Defendant serves Request for Production on Counter-Plaintiff.
3. 5/13/80 Counter-Plaintiff serves "alleged" answers on Counter-Defendant.
4. 8/29/80 Counter-Defendant serves Notice of Deposition on Counter-Plaintiff.
5. 9/5/80 President of Counter-Plaintiff fails to appear to give Deposition.
6. 9/5/80 Counter-Defendant's first Motion to Strike for Failure to Give Discovery.
7. 9/5/80 Counter-Defendant's Motion to Compel Discovery.

8. 9/8/80 *ORDER.* Motion to Strike denied, Motion to Compel continued pending 12(d) conference, Deponent ordered to appear.
9. 2/4/81 Counter-Plaintiff's attorney appears for 12(d) conference *unprepared.*
10. 2/25/81 Counter-Plaintiff's Second Motion to Strike.
11. 2/25/81 *ORDER.* Second Motion to Strike continued. Counter-Plaintiff to serve proposed pretrial order on Counter-Defendant by 3/13/81.
12. 2/25/81 12(d) conference on Interrogatories dated 3/28/80. Counter-Defendant agrees to file Supplemental Answers.
13. 3/13/81 Counter-Defendant fails to serve proposed pretrial order on Counter-Plaintiff as ordered by this Court on 2/25/81.
14. 3/16/81 Deposition of President of Counter-Plaintiff.
15. 3/16/81 Counter-Plaintiff promises *on the record* to serve Supplemental Answers to Interrogatories of 3/28/80 by Friday, 3/20/81.
16. 3/16/81 Counter-Plaintiff promises *on the record* to produce invoices of Counter-Plaintiff by 3/23/81.
17. 3/20/81 Counter-Plaintiff fails to produce Supplemental Answers as promised on 3/16/81.
18. 3/23/81 Counter-Plaintiff fails to produce invoices as promised.
19. 3/25/81 Counter-Plaintiff fails to file final pretrial order as ordered by this Court.
20. 3/25/81 Counter-Plaintiff's principal attorney fails to attend pretrial conference set by this Court one month earlier.
21. 3/25/81 Two hearing were held in the Judge's chambers, in the morning Counter-Plain-

> tiff's principal attorney sent a substitute attorney and the Court demanded that the principal attorney appear in the afternoon. After a lengthy hearing and argument, the Court ordered the Counter-Plaintiff to produce at long last the draft of the final pretrial order and to answer the Interrogatories to the 12(d) conference and the Motion to Compel attached hereto. If those documents were not supplied to Counter-Defendant's attorney by April 20, 1981 the Court stated that it finally would unequivocally dismiss this matter.

Tapeswitch Corporation strongly urges that on the authority of Judge McGarr's decisions in *Loctite Corp.* v. *Fel-Pro. Inc.*, (N.D. Ill. 1980) reported at BNA PTCJ No. 495, page A-8, 9/11/80, not only dismissal but also an award of attorney's fees is warranted. As Judge McGarr stated in that case, plaintiff's conduct during discovery had been "incomplete, untrue and evasive". He went on to state

> Plaintiff's repeated reliance on overruled objections, plaintiff's tenuous and misleading and irrelevant arguments, plaintiff's reliance on discarded facts, plaintiff's arguments and affidavits which were inconsistent with prior assertions of fact and belief, plaintiff's failure to comply with prior orders of this court, plaintiff's failure to correct misleading discovery responses, plaintiff's suppression and concealment of evidence, and plaintiff's assertions of compliance which were not true and correct, all lead this court to the conclusion that dismissal was the only fair and proper manner of dealing with this exceptional situation. Repeated admonishment by the court has failed to alter the behavior of plaintiff and its counsel in this case.

> On March 6, 1980, this court dismissed the complaint, by way of sanction for the conduct heretofore described.
>
> From the beginning of this litigation, this court "consistently emphasized the importance of discovery and of defendants' right to it" (order 3/6/80). Plaintiff has flouted this court's authority and orders in that regard.
>
> • • •
>
> The behavior and conduct of plaintiff and its counsel constitutes a clear breach of the duties plaintiff and plaintiff's counsel owe the court and opposing counsel.

Similarly, the Seventh Circuit Court of Appeals has, on at least two separate occasions, strongly affirmed district court decisions dismissing plaintiff's actions for failure to prosecute. *Beshear* v. *Weinszapfel,* 474 F.2d 127 (7th Cir. 1973) and *Sandee Mfg. Co.* v. *Rohm & Haas, Co.,* 298 F.2d 41 (7th Cir. 1962). Admittedly it is a subjective determ-ination as to when a plaintiff has overstepped the bounds of justice and forfeited its right to recovery. As the Seventh Circuit said in *Sandee*:

> No exact rule can be laid down as to when a court is justified in dismissing a case for failure to prosecute. Each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal. 298 F.2d at 43.

Similarly, in *Beshear,* the Court observed:

> At the time the district court dismissed the action, there was a context of facts, which we have set forth hereinbefore, reflecting a lack of prospective intent which went beyond the mere failure to attend the pretrial conference. 474 F.2d at 131.

Accordingly, this Court must look to the total circumstances of the present case. Tapeswitch urges that such an overview compels the conclusion that the gamesmanship of Counter-Plaintiff warrants dismissal.

Respectfully submitted,

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